

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 2037 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No
2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?No
5. Whether it is to be circulated to the Civil Judge? No

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SHANKARRAO JAGTAP SAKARAM

Versus

VASANTRAO SAKARAM PAWAR

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Appearance:

Mr.NK MAJMUDAR for MR PB MAJMUDAR for Petitioner

MR TRILOK J.PATEL for MR.JITENDRA M PATEL for Respondent

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CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 21/07/98

ORAL JUDGEMENT

1. This is tenant's revision under Section 29(2) of the Bombay Rent Act arising out of the following facts:

The landlord respondent had let out the disputed premises to the tenant - revisionist on monthly rent of Rs.6/-. The revisionist fell in arrears of rent since

1.1.1958. Notice of demand and eviction was allegedly served on revisionist on 13.4.1976. Nothing was paid within a month of service of notice of demand. Hence the Suit for eviction was filed.

2. The defendant despite of service of summons did not file any written statement nor contested the Suit.

3. The trial Court found that the two grounds for eviction set out in the plaint viz. bonafide requirement of the suit premises by the landlord and tenant being in arrears of rent for more than six months was not proved. Accordingly the decree for eviction was refused, but decree for arrears of rent within limitation was passed.

4. An appeal was preferred by the tenant. The Appellate Court passed a peculiar decree granting conditional decree to the landlord directing the tenant to deposit all arrears of rent due before 15.6.1982 failing which the defendant to hand over vacant possession of the suit premises to the plaintiff. It is this conditional decree of the lower Appellate Court which is under challenge in this revision.

5. Only two points arise for consideration in this revision. So far as bonafide requirement of the landlord is concerned both the courts below found that the requirement of the landlord was neither reasonable nor bonafide. Regarding arrears of rent the two courts below found that the tenant was in arrears of rent exceeding six months. However, the trial Court found that the notice was not validly served upon the tenant and as such the Decree for eviction was refused. The Lower Appellate Court however found that the notice was duly and properly served hence conditional decree for eviction was passed.

6. The first point for consideration in the revision is whether the Decree of the Lower Appellate Court is in accordance with law. The learned Counsel for the revisionist as well as the respondent argued that such conditional decree could not be passed by the lower Appellate Court. Both the Counsel agreed that if the case was covered under Section 12(3)(a) of the Bombay Rent Act, 1947, straight-way the Decree for possession should have been passed. The Decree of the Lower Court is further contrary to law because it lacks knowledge, how, the decree in Appeal is to be passed. The Appeal was allowed, but there is no mention in the operative portion of the judgment whether the Decree of the trial Court was set aside, reversed or modified. This lack of knowledge is really a matter of cause and concern.

Conditional decree of the nature which has been passed by the lower Appellate Court is also patently contrary to law. Actually it gives a licence to the tenant to deposit the entire arrears before 15.6.1982 and if this was done by the tenant or it would have been done by the tenant the Decree for possession could not have been made executable. This contradictory view is hardly provided under Section 12(3)(a) of the Act. The appellate decree is further contrary to law because it directs the tenant to deposit all arrears little realising that major portion of the arrears of rent became time barred. Such Decree therefore cannot be sustained inasmuch as it is contrary to law. This itself calls for interference in this revision.

7. The second point for consideration is whether the decree for eviction could be passed by the lower Appellate Court on the facts and circumstances established by the landlord on record. Obviously the rent was not paid by the revisionist since 1.1.1958. Notice was allegedly served on 13.4.1976. There is no averment in, the absence of written statement, that any rent was tendered within a month of service of notice of demand nor there could be any averment regarding dispute as to the standard rent raised by the revisionist. However, only on these two grounds the decree for eviction could not be passed.

8. Section 12(2) of the Bombay Rent Act reads as under :

"(2) No suit for recovery of possession shall be instituted by a landlord against a tenant on the ground of non-payment of the standard rent or permitted increases due, until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served upon the tenant in the manner provided in Section 106 of the Transfer of Property Act, 1882."

9. A plain reading of this section, therefore, makes it clear that the notice of demand has to be served upon the tenant in the manner provided in Section 106 of the Transfer of Property Act, 1882. This, therefore, takes us to consideration of manner of service contemplated under Section 106 of the Transfer of Property Act.

10. The second part of Section 106 of the Transfer of Property Act reads as under :

"Every notice under this section must be in writing signed by or on behalf of the person giving it and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants, at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

11. The harmonious construction of Section 12(2) of the Bombay Rent Act and Section 106 of the Transfer of Property Act would be that every notice may be under Section 12(2) of the Bombay Rent Act or a notice of eviction under Section 106 of the Transfer of Property Act, has to be given in writing signed by or on behalf of the person giving it and either be sent by post to the party who is intended to be bound by it or to be tendered or delivered personally to such party or to one of his family or servant at his residence or if such tender or delivery is not practicable, affix to a conspicuous part of the property.

12. Thus, the manner of service of notice provided under Section 106 of the T.P.Act is that at first it is to be served on the party who is intended to be bound by it. The second is that such notice should be tendered or delivered personally to such party. If, however, personal service on the party intended to be bound by the notice is not practicable then service of notice can be made on one of the family members of party intended to be bound by or on his servant. The third requirement is that such service should be made at the residence of the party intended to be bound by notice. The last is that if such service or delivery is not practicable the notice should be affixed on conspicuous part of the property which is commonly known as service of notice by affixation.

13. In the instant case the notice was sent by registered post to the tenant revisionist at his address. Admittedly and also according to the findings recorded by the two courts below the said notice was not served personally on the revisionist, intended to be bound by it. On the other hand the said notice was served on the son in law of the revisionist who was co-incidentally residing on the first floor of the same building where the tenant revisionist was residing on the ground floor. The son in law in common parlance is neither family member of the tenant nor he can be called as family member for the purpose of service of notice within the ambit of Section 106 of the Transfer of

Property Act. The son in law is also not to be equated with servant of the tenant, viz. the revisionist. The notice might have been addressed at the residence of the tenant, but it is not understood how such notice sent by registered post was handed over by the postman to the son in law of the tenant who was residing on the first floor. There is no evidence that the son-in-law was present on the ground floor and accepted the notice there itself. Consequently such service of notice is not a valid service of notice within the meaning of Section 106 of the Transfer of Property Act.

14. If the service of notice of demand was not valid and proper the tenant cannot be said to have failed to compliance of Section 12(3)(a) of the Act. The learned Counsel for the revisionist placing reliance upon the Supreme Court verdict in Arun K. Makhijani V/s. Jamnadas C. Tuliani, reported in 1990 (1) G.L.R. 209 contended that if the case falls under Section 12(3)(a) of the Bombay Rent Act the Court has no other alternative, but to pass Decree for eviction. However, the decree for eviction can be passed only when the case falls u/s. 12(3)(a) of the Act. Section 12(3)(a) of the Act reads as under :

"12(3)(a) : Where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court may pass a decree for eviction in any such suit for recovery of possession."

15. From the above section also it is manifest that unless notice of demand is served and landlord waits for compliance of the said notice for a period of one month no suit for eviction can be filed under this provision. As such service of notice of demand is a condition precedent for attracting the applicability of Section 12(3)(a) of the Act. If the condition precedent, viz. service of notice was itself not fulfilled the aforesaid provision cannot be applied for granting decree for possession.

16. For the reasons stated above no decree for possession could be passed against the revisionist under Section 12(3)(a) of the Act. The Judgment and Decree of the lower Appellate Court in these circumstances has to

be set aside. The revision has therefore to be accepted.

17. The revision is therefore allowed. The Judgment and Decree of the lower Appellate Court are set aside and that of the trial Court are restored. Cost of this revision shall be on the parties.

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